

Chor Phaik Har & Ors v Choong Lye Hock Estates Sdn Bhd & Ors

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO P-02-390-95

GOPAL SRI RAM, SITI NORMA YAAKOB JJCA AND MOHKOTAR SIDIN J
1 APRIL 1996

Civil Procedure — *Appeal* — *New argument* — *Respondent raised estoppel argument at appeal* — *Expression 'estoppel' did not appear anywhere in record of proceedings in court below* — *But trial judge came to decision based on doctrine of estoppel* — *Whether respondent allowed to raised that argument*

Equity — *Estoppel* — *General principle* — *When applicable* — *Whether elements such as representation and inducement must present* — *Whether it is a flexible doctrine by which justice is done according to facts of a particular case*

Civil Procedure — *Parties* — *Test to determine if party is properly impleaded* — *Whether proper or necessary party to action*

Succession — *Estoppel* — *Distribution of estates* — *Determination of assets of deceased* — *Letter of administration included certain estate* — *Party held out to world at large and admitted by conduct in administration action that deceased had share in estate* — *Whether party was now estopped to allege the opposite*

On 4 January 1943, an agreement was entered into between Choong Lye Hock Estates Sdn Bhd ('the first respondent') as the registered proprietor of Otaheitte Estate ('the Ayer Itam Estate') and one Chor Bah Say ('the deceased') where, inter alia, the deceased was granted the right to sell any part of the Ayer Itam Estate subject to the consent of the first respondent. It was also provided that after deduction of certain expenses, the balance of the proceeds of sale were to be divided in the portion of $\frac{3}{4}$ to the deceased and $\frac{1}{4}$ to the first respondent. The deceased died on 9 November 1949. On 13 December 1949, letters of administration were granted to Chor Sin Kheng and Chor Paik Gnor, and on 19 March 1954, a limited grant was made to them. However, notwithstanding the terms of the 1943 agreement, part of the Ayer Itam Estate were disclosed in the letters of administration ('the letters of administration') as forming part of the deceased's estate. In 1983, another suit was commenced by the trustees of the estate of one Oh Kee Lee ('Oh'), widow of the deceased, against the first respondent, the first appellant, and Chor Paik Gnor. An application was made for the appointment of interim receivers and managers over Ayer Itam Estate as well as Oh's estate, and an order in terms was granted in 1985 ('the 1985 order'). The order had two schedules. The first schedule was headed 'Ayer Itam Estate' and twelve titles were listed under it. The second schedule was headed 'Estate of Chor Bah Say deceased' and the seventh item therein referred to ' $\frac{3}{4}$ share in lands set out in Sch 1 above.' The titles of the lands appearing in the letters of administration

A corresponded with this share in the land listed under Sch 1. On 12 April 1994, the respondents took out an originating summons against the appellants, who were the personal representatives of the deceased, seeking inter alia, the distribution of the estate of the deceased. The appellants opposed on two principal grounds: (i) that the deceased's estate did not include a share in the Ayer Itam Estate as the 1943 agreement did not confer upon the deceased a proprietary interest but a contractual right which was not capable of devolvement upon death; and (ii) in view of the respondents' concession that the first respondent was the proper party to be impleaded, and the fact that the appellants had no interest in the subject matter, the appellants ought not to have been sued. The High Court found in favour of the respondents with costs to be borne by the appellants personally. The appellants appealed. The respondents' counsel submitted, inter alia, that: (i) the appellants' complaints were without foundation as the trial judge's order was directed against the first respondent, and not the appellants; (ii) the appellants were estopped from relying upon the 1943 agreement as they had by their actings over a long period of time held out that the deceased had a share in the Ayer Itam Estate; and (iii) the appellants were correctly impleaded as parties because of the deceased's interest in the lands in question. The appellants' counsel complained that the estoppel argument raised by the respondents' counsel at the appeal was a new point, and that the doctrine of estoppel did not apply in this case in any event.

Held, dismissing the appeal:

- (1) It did not matter that the expression 'estoppel' did not appear anywhere in the record of proceedings in the court below. The judge, when deciding the case in the respondents' favour, relied entirely on the appellants' conduct pointing to an admission by them that the lands in question formed part of the deceased's estate. There was no surprise in respect of the factual matrix that was relied upon to raise the estoppel, and the appellants' counsel certainly made no complaint of having been taken by surprise (see pp 215G-I and 216A).
- (2) It is settled beyond argument that estoppel is a flexible doctrine by which justice is done according to the facts of a particular case. It was, therefore, erroneous to apply the doctrine to the facts of a case as though it were some form of legal straitjacket (see p 216G).
- (3) Although decided cases speak of some of the features of the doctrine, such as a declaration or a representation and an inducement, these were but statements made in the context of the facts and circumstances of the particular case in which they appear. At the end of the day, the court has to answer the question: is it just that this particular litigant should, in the light of his conduct, succeed in the action given the peculiar facts of

the case? If the answer to that question is in the affirmative, then the doctrine does not apply; if it is in the negative, then it does (see p 216H); *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331 and *Habib Bank Ltd v Habib Bank AG Zurich* [1981] 2 All ER 650 followed.

- (4) The fact that the appellants' predecessors in title obtained letters of administration from the court by representing that the deceased had the stated interest and that the appellants did nothing to correct the impression created, coupled with their contentment to continue to administer the deceased's estate on the footing that it included the interest they now sought to deny clearly showed that they had, by their conduct, admitted and held out to the world at large that the deceased had a share in the estate. In these circumstances, to permit them to now adopt a volte-face would amount to countenancing a deception practised upon the court and upon all those who examined the letters of administration (see p 218H-I).
- (5) Although the appellants were not parties to the 1983 suit resulting in the 1985 order, it was immaterial as it was an administration action. Moreover, there was no doubt that the appellants had every intention of taking the benefit of the 1985 order. It would, therefore, be unjust to permit the appellants to now contend that the order did not apply to them (see p 219A-E).
- (6) The test to determine if a party was properly impleaded is to ask the question: were they necessary or proper parties? On the facts, it was clear that the assertion by the appellants, by their conduct, that the deceased had an interest in the lands in question made them necessary parties to the action (see p 220C-E); *Shafro v Bolckow Vaughan & Co* (1887) 34 Ch D 725 followed.

[Bahasa Malaysia summary]

Pada 4 Januari 1943, suatu perjanjian telah diikat antara Choong Lye Hock Estates Sdn Bhd ('penentang pertama') sebagai tuan punya berdaftar Estet Otaheitte ('Estet Ayer Itam') dan seorang yang bernama Chor Bah Say ('si mati') di mana, antara lain, si mati telah diberi hak menjual mana-mana bahagian Estet Ayer Itam tertakluk kepada kebenaran penentang pertama. Adalah juga diperuntukkan bahawa selepas potongan perbelanjaan tertentu, baki hasil jualan harus dibahagikan dalam bahagian $\frac{3}{4}$ kepada si mati dan $\frac{1}{4}$ bahagian kepada penentang pertama. Si mati telah meninggal dunia pada 9 November 1949. Pada 13 Disember 1949, surat kuasa mentadbir telah diberikan kepada Chor Sin Kheng dan Chor Phaik Gnor, dan pada 19 Mac 1954, satu geran terhad telah dibuat. Namun demikian, meskipun terdapat terma perjanjian 1943, sebahagian daripada Estet Ayer Itam telah didedahkan dalam surat kuasa mentadbir ('surat kuasa mentadbir tersebut') sebagai membentuk sebahagian daripada

- A estet si mati. Dalam tahun 1983, suatu guaman lain telah dimulakan oleh pemegang amanah estet seorang yang bernama Oh Kee Lee ('Oh'), iaitu balu si mati, terhadap penentang pertama, perayu pertama dan Chor Phaik Gnor. Satu permohonan telah dibuat untuk pelantikan penerima interim dan pengurus ke atas estet Ayer Itam dan juga estet Oh, dan satu perintah seperti dikehendaki telah diberi dalam tahun 1985 ('perintah tahun 1985'). Perintah itu mempunyai dua jadual. Jadual pertama bertajuk 'Estet Ayer Itam' dan 12 hakmilik telah disenaraikan di bawahnya. Jadual kedua bertajuk 'Estet Chor Bah Say si mati' dan butiran ketujuh dalamnya merujuk kepada '3/4 syer dalam tanah dinyatakan dalam Jadual 1 di atas'. Hakmilik tanah yang muncul dalam surat kuasa mentadbir secocok dengan syer dalam tanah yang disenaraikan dalam Jadual 1 tersebut. Pada 12 April 1994, penentang-penentang telah mengambil satu saman pemula terhadap perayu-perayu yang merupakan wakil diri si mati, menuntut, antara lain, pembahagian estet si mati. Perayu-perayu telah menentang atas dua alasan utama: (i) bahawa estet si mati tidak termasuk syer dalam Estet Ayer Itam oleh kerana perjanjian tahun 1943 tidak memberikan si mati suatu faedah ketuanpunyaan tetapi suatu hak kontraktual yang tidak boleh diturunkan atas kematian; dan (ii) memandangkan konsesi penentang-penentang bahawa penentang pertama adalah pihak betul yang diimplid, dan fakta bahawa mereka tidak mempunyai kepentingan dalam hal perkara itu, mereka tidak patut didakwa. Mahkamah Tinggi telah membuat keputusan yang memihak kepada penentang-penentang dengan kos ditanggung oleh perayu-perayu secara peribadi. Perayu-perayu telah merayu. Peguam bagi penentang-penentang menghujah, antara lain, bahawa: (i) aduan perayu-perayu tidak berasas kerana perintah hakim perbicaraan adalah diarahkan kepada penentang pertama, dan bukan perayu-perayu; (ii) perayu-perayu diestop daripada bergantung kepada perjanjian tahun 1943 oleh kerana mereka telah melalui tindakan mereka untuk tempoh masa yang lama mempertahankan bahawa si mati mempunyai sebahagian dalam Estet Ayer Itam; dan (iii) perayu-perayu telah diimplid dengan betul sebagai pihak akibat kepentingan si mati dalam tanah berkenaan. Peguam bagi perayu-perayu telah mengadu bahawa penghujahan estoppel yang dibangkitkan oleh peguam penentang-penentang di rayuan adalah satu perkara baru, dan walau bagaimanapun, doktrin estoppel tidak terpakai dalam kes ini.
- G
- H **Diputuskan**, menolak rayuan itu:
- (1) Adalah tidak menjadi masaalah jika ungkapan 'estoppel' tidak muncul dalam mana-mana rekod prosiding mahkamah di bawah. Ketika memutuskan kes dengan memihak kepada penentang-penentang, hakim telah bergantung keseluruhannya pada kelakuan penentang-penentang yang mencerminkan pengakuan mereka bahawa tanah berkenaan membentuk sebahagian daripada estet si mati. Matriks faktual yang didasarkan untuk menimbulkan estoppel tidak membawa kejutan, dan peguam perayu-perayu
- I

- memang tidak membuat aduan bahawa ia merupakan sesuatu yang mengejutkan (lihat ms 216G–I dan 217A). A
- (2) Adalah mantap bahawa estoppel adalah suatu doktrin fleksibel di mana melaluinya, keadilan boleh tercapai menurut fakta kes tertentu. Lantaran itu, adalah salah untuk memakai doktrin itu kepada fakta sesuatu kes seolah-olah adanya kongkongan undang-undang (lihat ms 216G). B
- (3) Walaupun kes yang diputuskan menyebut beberapa ciri doktrin itu, seperti satu deklarasi atau satu representasi dan satu dorongan, ciri-ciri tersebut hanya merupakan pernyataan yang dibuat dalam konteks fakta dan keadaan kes yang tertentu di mana ciri-ciri tersebut muncul. Akhirnya, mahkamahlah yang harus menjawab soalan: adakah adil jika jika litigan yang berkenaan berjaya dalam tindakan selepas mempertimbangkan kelakuannya dan fakta istimewa kes? Jika jawapan kepada soalan itu adalah positif, maka doktrin itu tidak terpakai; jika jawapannya ialah 'tidak', maka ia terpakai (lihat ms 216H); *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331 dan *Habib Bank Ltd v Habib Bank AG Zurich* [1981] 2 All ER 650 diikuti. C D
- (4) Fakta bahawa pendulu hakmilik perayu-perayu telah memperolehi surat kuasa mentadbir dari mahkamah dengan membuat representasi bahawa si mati mempunyai kepentingan yang dinyatakan, dan fakta bahawa perayu-perayu tidak berbuat apa-apa untuk membetulkan tanggapan yang diwujudkan, disertai dengan kepuasan mereka untuk terus mentadbir eset si mati atas dasar bahawa eset tersebut termasuk kepentingan yang mereka nafikan sekarang, jelas menunjukkan bahawa mereka telah menerusi kelakuan mereka, mengakui dan mempertahankan bahawa si mati mempunyai syer dalam eset itu kepada sejabat dunia. Dalam keadaan ini, untuk membenarkan mereka menukar keseluruhan pendapat mereka sekarang samalah seperti menyokong satu penipuan yang diamalkan ke atas mahkamah dan ke atas kesemua mereka yang telah memeriksa surat kuasa mentadbir tersebut (lihat ms 218G–I). E F G
- (5) Walaupun perayu-perayu tidak merupakan pihak kepada guaman tahun 1983 yang mengakibatkan perintah tahun 1985, ia adalah tidak material kerana guaman tersebut merupakan satu tindakan pentadbiran. Selanjutnya, tidak terdapat keraguan bahawa perayu-perayu memang bertujuan mempergunakan perintah tahun 1985. Oleh yang demikian, adalah tidak adil untuk membenarkan perayu-perayu berhujah sekarang bahawa perintah itu tidak terpakai kepada mereka (lihat ms 219A–E). H
- (6) Ujian bagi menentukan sama ada suatu pihak telah diimplid dengan betul atau tidak, ialah dengan menanya soalan: adakah mereka pihak-pihak yang perlu atau betul? Atas fakta kes ini, adalah jelas bahawa pernyataan perayu-perayu, yang diperlihatkan I

- A melalui kelakuan mereka, bahawa si mati mempunyai kepentingan dalam tanah berkenaan, telah menyebabkan mereka menjadi pihak yang perlu kepada tindakan tersebut (lihat ms 220C-E); *Shafto v Bolckow Vaughan & Co* (1887) 34 Ch D 725 diikuti.]

- B [Editorial Note: The appellants have applied for leave to appeal to the Federal Court vide Civil Application No 08-20-96.]

Notes

- C For cases on appeals, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 259-699.
For cases on parties, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2362-2498.

Cases referred to

- D *Boustead Trading* (1985) *Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331
Habib Bank Ltd v Habib Bank AG Zurich [1981] 2 All ER 650
M Ratnavale v S Lourdenadin [1988] 2 MLJ 371
Shafto v Bolckow Vaughan & Co (1887) 34 Ch D 725
E *Thornhill v Weeks* [1913] 1 Ch 438

Legislation referred to

Evidence Act 1950 s 115

- F **Appeal from:** Originating Summons No 24-326-94 (High Court, Pulau Pinang)

Raja Aziz Addruse (*Jannu Babjan* with him) (*Lim Cheng Poh Lim & Rahim*) for the appellants.

- G *RR Sethu* (*R Rajasingam* with him) (*R Rajasingam & Co*) for the respondents.

Cur Adv Vult

- H **Gopal Sri Ram JCA** (delivering the judgment of the court): Otaheitte Estate, which is now known as Ayer Itam Estate, is a well-known piece of property in Penang. It has a long history and there has been much litigation about it.

- I The story began as long ago as 1941. On 26 August of that year, an agreement was entered into between Chor Bah Say (whom we shall throughout this judgment refer to as 'the deceased') and the first respondent company, which we shall refer to hereafter as 'the company'. No one knows what that agreement was about. It has not surfaced. According to the affidavit of one Robert Choong Ewe Jin, a director of the company,

affirmed on 4 April 1968 and filed in another suit (Civil Suit No 64 of 1968), that document cannot be located. A

Then, on 24 October 1941, an indenture was made between one William Stewart and the company ('the Stewart indenture'), under which William Stewart conveyed to the company all those hereditaments which comprised Otaheitte Estate for a consideration of RM140,000. The Stewart indenture was duly presented to the relevant registering authority under the provisions of the relevant legislation that governed immovable property in Penang at that time. The company is, therefore, the registered proprietor of Otaheitte Estate. B

On 4 January 1943, another agreement ('the 1943 agreement') was entered into between the company and the deceased. It is actually dated 4 January 2603, that is to say, according to the calendar of Imperial Japan, to whose occupation this country was then subjected. It is a most important document to the present appeal, for upon its terms turns the whole argument of the appellants who are the personal representatives and some of the beneficiaries of the deceased's estate. We therefore reproduce its text in full: C

This Agreement is made the 4th day of January 2603 between Chor Bah Say of 159, Kimberly Street, Penang, trader of the one part and Choong Lye Hock Estates Ltd, whose registered office is situate at 59, Beach Street, Penang hereinafter called the Company of the other part. D

Witnesseth as follows: E

- 1 In consideration of the Company paying to the said Chor Bah Say the sum of Ringgit Malaysia: Fifty Five Thousand for payment to Khor Boon Hun for the purchase or the surrender of the existing lease or leases on or over Otaheitte Estate now held by the said Khor Boon Hun to the Company, such purchase being made at the request of the said Chor Bah Say, and the said Chor Bah Say and the Company hereby agree as hereinafter mentioned. F
- 2 The Agreement dated 26 August 1941 and made between the Company of the one part and the said Chor Bah Say of the other part for the sale of the said Otaheitte Estate to the said Chor Bah Say is hereby cancelled and is of no further effect. G
- 3 The said Chor Bah Say shall without remuneration be in management of the said Otaheitte Estate and shall collect all the income rents and profits thereof and account for same to the Company whenever required to do so.
- 4 The said Chor Bah Say shall sell such part or parts of the said Otaheitte Estate as he shall deem fit but he must first obtain the written consent of the Company for each such sale, the Company to be at liberty to refuse such consent if they consider the price or prices inadequate. H
- 5 All money to be obtained from the sale or sales of part or all of the said Otaheitte Estate shall be paid to the Company and shall be applied together with the nett incomes rents and profits thereof to payment of: I
 - (a) All money paid by the Company for the purchase of the said Otaheitte Estate and interest thereon at the rate of RM1.50

- A per centum per mensem down to date hereof to be added as capitalized interest.
- (b) Interest on all the money stated in (a) above and all money paid for the purchase or surrender of all existing leases on the said Otaheitte Estate from date hereof and from date of payment at the rate of 0.75 cents per centum per mensem and also all expenses whatever incurred in the purchase of the said Estate.
- B (c) All money paid by the said Chor Bah Say and all reasonable expenses incurred by him in obtaining the sale of the said Otaheitte Estate to the Company and all reasonable costs and expenses in obtaining the surrender or purchase of the existing leases of the said Estate.
- C (d) Similar interest at the rate of 0.75 cents on all money 'except expenses' paid by the said Chor Bah Say toward the purchase of the said Otaheitte Estate.
- D 6 The balance money after payment of all the money stated in para 5 hereof shall be divided as to three fourths thereof to the said Chor Bah Say and as to the remaining one fourth thereof to the Company.
- 7 All losses (if any) to be incurred in the realizations or sale of the said Otaheitte Estate shall be borne as to one-fourth ($\frac{1}{4}$) share thereof by the Company and as to the remaining three fourths ($\frac{3}{4}$) share thereof by the said Chor Bah Say. Should his share of the losses exceed all the moneys paid and expended by him toward the purchase of the said Otaheitte Estate, the said Chor Bah Say shall pay such excess to the Company.
- E 8 The Agreement shall be deemed to commence and take effect on the 1 January 2603.
- F 9 The said 'Chor Bah Say' shall mean and include his personal representative and the term 'the Company' shall include their assigns.
- 10 If and when required by either party hereto a proper Agreement or deed as the case may be setting out the above terms shall be drawn up and executed by the parties hereto.
- G In Witness whereof etc.

The deceased died on 9 November 1949. He was survived by his widow Oh Kee Lee and children who included three daughters, namely, Chor Saw Soon, Chor Paik Gnor and Chor Phaik Har (the first appellant and one of the personal representatives of the deceased's estate). Later, Chor

- H Paik Gnor died. The second respondent to this appeal is her personal representative.

On 13 December 1949, letters of administration in respect of the deceased's estate were granted to Chor Sin Kheng and Chor Paik Gnor. Later, on 19 March 1954, a limited grant of letters of administration was issued by the High Court at Penang to these two persons. It is common ground between the parties in this appeal that the lands that form the subject matter of the dispute, and which are part of Otaheitte or Ayer Itam

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Estate are, notwithstanding the terms of the 1943 agreement, disclosed in the letters of representation as forming part of the deceased's estate. A

In 1983, another suit ('the 1983 suit') was commenced by one Oh Phaik Lin, Chor Saw Soon and Khoo Kay Hoo as trustees of the estate of one Oh Kee Lee, deceased against the company, Chor Paik Gnor and the first appellant. An application was made for the appointment of interim receivers and managers over Ayer Itam Estate as well as the deceased's estate. Edgar Joseph Jr J (now FCJ) heard and granted the application on 1 March 1985. His written judgment on the matter is reported in [1985] 1 CLJ 280 and it contains a succinct history of Otaheite Estate. B

The order made by Edgar Joseph Jr J (as he then was) (which we will call, for convenience, 'the 1985 order') has two schedules. The first schedule to the order is headed 'Ayer Itam Estate'. Twelve titles are listed under it. All of them correspond with the titles shown in the Stewart indenture. The second schedule to the order is headed 'Estate of Chor Bah Say deceased'. The seventh item in the second schedule refers to a $\frac{3}{4}$ share in lands set out in Sch I above.' The titles of the lands appearing in the letters of representation reflect this share in the lands in question. C D

The relevance of the schedules to the 1985 order will appear when we come to consider the arguments advanced on behalf of the respondents.

We now turn to the litigation that is the subject of the present appeal. E

On 12 April 1994, the respondents took out an originating summons by which they sought, inter alia, the distribution of the estate of the deceased. This summons was opposed by the appellants on two principal grounds. We will say more about these momentarily.

But, what is abundantly clear is that the axis of the dispute between the parties in the present litigation turns upon the question whether the deceased's estate includes a share in Otaheite Estate. In the court below, and before us, the appellants argued for a negative response to this question: the respondents, on the other hand, argued for an affirmative answer. F

The other point relates to the impleading of parties. The respondents conceded that the company was the proper party to be impleaded. In view of this, it was argued by the appellants that they had no interest in the matter and ought never have been sued. G

The summons came before Vincent Ng J. After hearing the arguments of counsel, he held in favour of the respondents and granted the relief claimed in the summons. He also found the appellants to have resisted the action upon unarguable grounds and for that reason, ordered the appellants to bear the costs personally. H

Before us, Raja Aziz of counsel for the appellants, in the course of his oral argument, summarized his submissions in support of the appeal as follows: I

- (1) The 1943 agreement did not create, in favour of the deceased, any proprietary interest in Otaheite Estate. All that that agreement did

- A was to confer upon the deceased a purely contractual right that is binding between the appellants as the personal representatives of the deceased and the company and is not capable of devolvement upon death;
- B (2) In view of the concession made by the respondents in the court below, the learned judge ought to have refused any relief against the appellants as they had no interest in the subject matter of the summons.

We now summarize Mr Sethu's submissions supporting the judgment appealed from as follows:

- C (1) the appellants' complaints are without foundation because the order made by the judge is directed against the company and not the appellants
- (2) whatever the 1943 agreement may say on its face, the appellants have, by their actings over a long period of time, held out that the deceased had a share in Otaheite Estate. They are therefore estopped from now relying upon the written words of the 1943 agreement and contending that the deceased merely had a limited power of disposal;
- D (3) in any event, the 1943 agreement merely regulated pre-existing proprietary rights and does not create any new ones;
- E (4) the appellants were correctly impleaded as parties because of the deceased's interest in the lands in question.

F In the midst of Mr Sethu's submissions, it became apparent that there were important questions of law which, through no fault of counsel, had not been addressed by the authorities tendered to us in advance of the appeal. Accordingly, at the conclusion of the hearing on 21 November 1995, we directed counsel on both sides to deliver written submissions and thereafter reserved judgment. In compliance with our directions, the last of the written submissions was delivered on 30 January 1996.

G Raja Aziz, in his written response to the written submissions of Mr Sethu, had described the estoppel argument raised by the latter during the oral hearing as a new point. In a sense, this is quite correct. The expression 'estoppel' does not seem to appear anywhere in the record of proceedings in the court below. The term 'estoppel' was used by Mr Sethu in response

H to a question put to him by a member of this court during argument.

I But it is interesting to note that the judge, when deciding the case in the respondents' favour, relied entirely on the appellants' conduct pointing to an admission by them that the lands in question formed part of the deceased's estate. Of course, the judge should have realized that, in essence, the respondents were relying upon the doctrine of estoppel. It is unfortunate that he did not recognize the creature before him for what it truly was. In fairness to him, neither did counsel who appeared in the court below. That is probably why the term 'estoppel' was never used.

Does this really matter? We do not think it does. After all, there was no surprise in respect of the factual matrix that is relied upon to raise the estoppel. And Raja Aziz certainly makes no complaint of having been taken by surprise.

The first, second and sixth submissions in his written argument deal with the point as follows:

- (1) for estoppel to apply in this case, the appellants must have made a declaration or done an act with the intention of causing the respondents to believe a thing to be true and to act upon such belief: s 115 of the Evidence Act 1950
- (2) a study of all the cases cited in *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331 will show that in every instance, the declaration in question was acted upon by the party invoking the doctrine.
- (6) there is no evidence to show that the statements (assuming them to amount to some form of admission) had caused the respondents to believe that the estate of Chor Bah Say was entitled to a — undivided share in the lands and that they had acted upon that belief. The first respondents (as a party to the 1943 Agreement) and the other respondents (as beneficiaries to the estate of Chor Bah Say) could not have been unaware of their rights under the agreement. It is, in any case, not open for them to claim that they were not aware of the true position of their rights and obligations under the agreement.

As we earlier observed, the judge held in the respondents' favour based entirely upon the appellants' previous conduct. We think that he was right in doing so. In our judgment, the facts and circumstances of the case warrant the conclusion that it would be inequitable for the appellants to succeed in this case. We will explain why this is so, first by reference to the law governing the doctrine now under discussion, and second by reference to the relevant facts of this case.

First, the law. We take as settled beyond argument that estoppel is a flexible doctrine by which justice is done according to the facts of a particular case. It is, therefore, erroneous to apply the doctrine to the facts of a case as though it were some form of legal straitjacket.

Although decided cases speak of some of the features of the doctrine, such as a declaration or a representation and an inducement, these are but statements made in the context of the facts and circumstances of the particular case in which they appear. At the end of the day, the court has to answer the question: is it just that this particular litigant should, in the light of his conduct, succeed in the action given the peculiar facts of the case? If the answer to that question is in the affirmative, then the doctrine does not apply; if it is in the negative, then it does.

No useful purpose will therefore be served by entering upon a discussion of the several cases that deal with the doctrine. They are but

- A mere illustrations of a much wider principle and contain statements that are relevant to their peculiar facts.

For present purposes, we think it quite sufficient to quote from two authorities to support the broad and liberal proposition that governs the operation of the doctrine.

- B The first is *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331 at p 344, where the Federal Court, when dealing with the application of the doctrine to a case of encouragement, made the following statement of principle:

- C The time has come for this court to recognize that *the doctrine of estoppel is a flexible principle by which justice is done according to the circumstances of the case*. It is a doctrine of wide utility and has been resorted to in varying fact patterns to achieve justice. Indeed, the circumstances in which the doctrine may operate are endless. (Emphasis supplied).

- D In respect of the argument that the party invoking the doctrine must demonstrate his reliance upon his opponent's conduct, the Federal Court said (at p 347):

- E The traditional view adopted by jurists of great learning is that a litigant who invokes the doctrine must prove that he was induced by the conduct of his opponent to act in a particular way. However, having undertaken a careful examination of the authorities, we are of opinion that this requirement is not an integral part of the doctrine. *All that a representee (which term includes one who has received encouragement in the sense we have discussed earlier) need do is to place sufficient material before a court from which an inference may fairly be drawn that he was influenced by his opponent's actings. Further, it is not necessary that the conduct relied upon was the sole factor which influenced the representee. It is sufficient that 'his conduct was so influenced by the encouragement or representation ... that it would be unconscionable for the representor thereafter to enforce his strict legal rights'* (per Robert Goff J in *Amalgamated Investment* [1982] 1 QB 84 at p 105). (Emphasis added)
- F

- G The second authority we cite is *Habib Bank Ltd v Habib Bank AG Zurich* [1981] 2 All ER 650, where at p 688 of the report, Oliver LJ in the English Court of Appeal approved in the following passage the observation by the trial judge, Whitford J:

- H I have to acknowledge my indebtedness to counsel on both sides for some illuminating arguments, but at the end of them I find myself entirely unpersuaded that the judge erred in any material respect. He concluded his judgment in this way on the question of estoppel:

- I 'Of course, estoppel by conduct has been a field of the law in which there has been considerable expansion over the years and it appears to me that it is essentially the application of a rule by which justice is done where the circumstances of the conduct and behaviour of the party to an action are such that it would be wholly inequitable that he should be entitled to succeed in the proceeding.'

That, to my mind, sufficiently appears on the facts of this case. (Emphasis added).

In view of the approach taken by the Federal Court in *Boustead Trading*, we have no difficulty in rejecting the submission of Raja Aziz (contained in his written argument) on the scope and operation of the doctrine and what he perceives to be its requirements.

We now turn to the argument of Raja Aziz upon the evidential point. In order to properly appreciate his contention, it is necessary to see the facts and circumstances relied upon by the respondents in support of the plea of estoppel. They include the following:

- (1) the lands in question are shown as forming part of the estate of the deceased in the letters of administration.
- (2) the schedules to the 1985 order, in particular the second schedule, show the deceased to be the owner of a three-quarter share in Ayer Itam Estate.
- (3) the statutory declaration made by the first appellant (in her capacity as one of the trustees and beneficiaries of the deceased's estate) in support of a caveat she lodged against the titles to the lands in question. In this declaration, the first appellant has suggested that she is entitled to enter a caveat because the company had, in the 1983 suit, admitted that the deceased is a co-owner of the lands.

Based on the foregoing, Mr Sethu has argued that there has been an admission by the appellants, or at the very least by the first appellant, that the deceased has an interest in the lands in question. That admission, he says, operates as an estoppel on the facts and circumstances of this case. His reliance upon the schedules to the order is based upon the premise, not challenged by Raja Aziz, that the 1983 suit was an administration action and that all orders made therein bind the appellants, whether as beneficiaries or as personal representatives or trustees.

We think that there is merit in Mr Sethu's argument. The circumstances of this, or indeed any case where the plea of estoppel is taken, are to be viewed not individually or separately but together as forming the strands of a rope that coils itself around one who is alleged to be guilty of unconscionable conduct. When such an approach is taken, there is no doubt in our minds that the totality of the circumstances of this case show the appellants to have, by their conduct, admitted and held out to the world at large that the deceased had a share in Otaheite Estate.

Among other matters, we mentioned the fact that their predecessors in title obtained letters of administration from the court by representing to it that the deceased had the stated interest. That was the basis on which the letters were issued to them. The present appellants did nothing to correct the impression created by the terms of the letters of administration. They were content to continue to administer the deceased's estate on the footing that it included the interest they now seek to deny. In these circumstances, to permit them to now adopt a volte-face would, in our

- A judgment, amount to countenancing a deception practised upon the court and upon all those who examine the letters of representation.

As far as the 1985 order is concerned, the argument of Raja Aziz that his clients were not parties to the suit in which it was made has, in our judgment, been sufficiently met by Mr Sethu's argument that the 1983 suit was an administration action.

Williams & Mortimer, *Executors, Administrators and Probate*, [being a revised edition of *Williams on Executors* (15th Ed) and *Mortimer on Probate* (3rd Ed)] explains an administration action as follows (at p 551):

C Where problems or disputes arise in the course of administration as between creditors, beneficiaries or personal representatives, the court will normally be approached by writ or originating summons, for the purpose of resolving the difficulties and getting the estate properly administered. Such proceedings are known as administration proceedings and are to be distinguished from litigation adverse to the estate in which the personal representatives are involved as plaintiffs or defendants representing the deceased.

D An examination of the carefully considered judgment of Edgar Joseph Jr J (as he then was), to which we have earlier referred, puts it beyond a peradventure that the 1983 suit was an administration action.

E Further, there is no doubt that the appellants had every intention of taking the benefit of the 1985 order. Hence the caveat against the titles in reliance upon it. In our judgment, it would be unjust to permit the appellants to now contend that the order does not apply to them.

F We now turn to consider one other point raised by Mr Sethu. It has to do with the affidavit of Robert Choong Ewe Jin in the 1968 suit to which we referred very early in this judgment. That affidavit was produced by the appellants as an exhibit under an affidavit sworn, filed and used in the court below. Robert Choong has, in that affidavit, accepted that the deceased had a share in the lands in question.

G Mr Sethu says that since it was the appellants who produced and relied on the affidavit, it is the same as them having called Robert Choong as a witness and he having given evidence adverse to them. In accordance with settled principles, that evidence would, counsel submits, bind the party who tendered it. See *M Ramavale v S Lourdenadin* [1988] 2 MLJ 371 at p 380.

H With respect, we do not think it possible to equate the annexing of an affidavit as an exhibit to another affidavit to the calling of a witness who ends up giving adverse evidence. The latter is a much clearer case. The former is not, for a party may produce the affidavit filed in other proceedings to demonstrate that the particular deponent had made a previous inconsistent statement or an admission. So, it depends very much on the purpose or object which the party producing such an affidavit seeks to achieve.

I Whatever its merits may be, we do not find it necessary to decide this appeal on the evidential point raised by Mr Sethu because of the other

well-established circumstances which tell against the appellants. And of these we have already spoken. A

For the reasons given, we are unable to agree with Raja Aziz's first submission, namely, that the judge was wrong in holding that the deceased had a share in the lands in question. Having read the judgment of the learned judge with care, we are unable to disagree with him in respect of the conclusion he arrived at upon this issue. B

That brings us to the second main point. The complaint made by the appellants, to recall, is that they have no interest in the proceedings and should not have been impleaded because the lands are all registered in the name of the company. C

We think that the test to be applied in a case as the present is to ask the question: were the defendants (the appellants before us) necessary or proper parties? That question, when answered one way or another, will determine the point taken.

Looking at the facts once again, it is clear that the assertion by the appellants, by their conduct, that the deceased had an interest in the lands in question makes them necessary parties to the action. See, for example, *Shafto v Bolckow Vaughan & Co* (1887) 34 Ch D 725. D

On the facts of the present case, it was essential to have them before the court to deal with the interest they had always asserted. See *Thornhill v Weeks* [1913] 1 Ch 438. Merely impleading the company would have been insufficient. E

For these reasons, we reject the arguments advanced by the appellants upon the second point.

The upshot is that the appellants have singularly failed to demonstrate any error on the part of the learned judge. We therefore dismiss this appeal and affirm all orders made by the judge. The respondents will have the costs of the appeal. The security deposit in court will be paid out to them to account of their taxed costs. For the reasons given by the judge, the costs of this appeal will not be paid out of the estate of the deceased but by the appellants personally. F G

Order accordingly.

Reported by Ringo KL Low

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